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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/615,546

07/08/2003

Chris Miller

0-03-046

9069

34492

7590

04/21/2008

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EXAMINER

PRYOR, ALTON NATHANIEL

ART UNIT

PAPER NUMBER

1616

MAIL DATE

DELIVERY MODE

04/21/2008

PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

<b>Office Action Summary</b>	<b>Application No.</b> 10/615,546	<b>Applicant(s)</b> MILLER ET AL.	
	<b>Examiner</b> ALTON N. PRYOR	<b>Art Unit</b> 1616	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 04 April 2008.
- 2a) ☐ This action is **FINAL**.                      2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 9-15 and 17-33 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 9-15, 17-33 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All    b) ☐ Some \*    c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |  |   |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)          | 4) <input type="checkbox"/> Interview Summary (PTO-413)           |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____                                      |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)          | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____  | 6) <input type="checkbox"/> Other: _____                          |

### **DETAILED ACTION**

Applicant's request for reconsideration of the finality of the rejection of the last Office action is persuasive and, therefore, the finality of that action is withdrawn.

Applicant's arguments, see paper, filed 4/4/08, with respect to the rejection(s) of claim(s) 9-15,17-33 under Obviousness type double patenting have been fully considered and are persuasive. Therefore, the rejection has been withdrawn.

However, upon further consideration, a new ground(s) of rejection is made below.

#### ***Double Patenting***

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

Claims 9-15,17-33 are no longer rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-15 of U.S. Patent No. 7122018 and claims 1-23 of U.S. Patent No. 6793644. Although the conflicting claims are not identical, they are not patentably distinct from each other

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because both patents like the instant application disclose a method of promoting the healing of a wound comprising exposing the wound to a nitric oxide bath. The patents do not teach the application of a wound-healing agent to the wound in addition to the nitric oxide. However, the patented claims employ “comprising” language, which allows for the inclusion of a wound-healing agent.

*Response to Applicants' argument*

The Applicants are correct in that it is inappropriate to issue double patenting rejections over USPNs 7122018 and 6793644 with respect to the instant claims.

USPN '018 claims the priority of instant application. Therefore, the USPN '018 parent is a continuation of the instant application. The present application is the parent of the USPN '018 patent. For this reason the ODP rejection over the USPN '018 is withdrawn.

USPN '644 differs in inventorship and ownership from instant application. For this reason the ODP rejection over the USPN '644 is withdrawn.

**New Rejection**

***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 9-15,17-33 are rejected under 35 U.S.C. 103(a) as being unpatentable over Stenzler (USPN 6793644; 9/21/04) and Karagoezian (USPN 6592907; 7/15/03).

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The Stenzler's patent teaches a method of promoting the healing of a wound comprising exposing the wound to a nitric oxide bath (abstract, column 2 line 57 – column 3 line 37, column 4 lines 50-67 and claims). The Stenzler's patent does not teach the application of a wound-healing agent to the wound in addition to the nitric oxide. However, the patented claims employ "comprising" language, which allows for the inclusion of a wound-healing agent (see claims). Karagoezian teaches a composition that can be used to treat wounds (see abstract). Karagoezian teaches the composition can comprise a lubricant (see column 1 lines 27-36, column 7 line 63 – column 8 line 24, column 9 lines 20-28) which is defined as a wound healing agent in the instant specification. One having ordinary skill in the art would have been motivated to modify the method disclosed by Stenzler to include the lubricant as the wound healing agent taught by Karagoezian. One would have been motivated to do this since both inventions are to a process of treating wounds.

#### *Response to Applicants' Argument*

The Applicants argue that Stenzler teaches away from the use of a wound healing agent. The Applicants refer the Examiner to column 1 lines 17-57 of the Stenzler's patent where it discloses issues associated with the shortingcomings of using anti-infective agents. The Examiner argues that the Stenzler's patent teaches the shortcomings associated with using both anti-infective agents (column 1 lines 17-57) as well as nitrous oxide (column 1 line 58 – column 2 line 55). However, the Stenzler's patent still employs nitrous oxide (therefore by teaching the shortcomings associated with using nitrous oxide does not make the Stenzler's avoid or teach away from the use

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of nitrous oxide) The Examiner argues that the Stenzler's patent does not teach explicitly that anti-infective agents are never to be used in conjunction with nitrous oxide. The Stenzler's patent absolutely never mentions the phrase "wound healing agents" which is the genus of the species "anti-infective agent". Note the instant application lists the "anti-infective agent" as a single class of "wound healing agent" among many other classes of "wound healing agents" such as lubricants. The prior art cited does not describe the lubricant as an "anti-infective agent," but does suggest that the lubricant can be used in a composition for treating wounds.

### ***Telephonic Inquiry***

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Alton N. Pryor whose telephone number is 571-272-0621. The examiner can normally be reached on 8:00 a.m. - 4:30 p.m..

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Johann Richter can be reached on 571-272-0646. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Alton N. Pryor/  
Primary Examiner, Art Unit 1616